POST OFFICE DEPARTMENT

ASSISTANT POSTMASTER GENERAL

Bureau of Transportation

WASHINGTON 25, D. C.

In reply refer to:
HC:SR:S:IF

June 22, 1953

Charles T. Crowder
Suffolk, Virginia

Dear Sir:

Under the provisions of paragraph (b) of Section 97.29, Postal Laws and Regulations an order has been issued renewing your contract for service on the star route indicated below for an additional term from July 1, 1953, to June 30, 1957, at the rate prevailing on June 30, 1953, subject to any change that may be made in the operation under your current contract.

Renewal contract will be prepared in duplicate and forwarded to your local postmaster for execution by you with good and sufficient sureties. If your recent renewal bond was executed by a surety company the same surety company should be furnished by you as surety on the renewal contract. You should exercise great care to see that these forms are both completely and properly executed and returned to the Department at the earliest practicable date.

No payment can be made for service performed under your renewal contract until after such contract is properly executed and filed in the Department. Therefore, there may be some delay in making payment for service performed during July, but thereafter payments should be received by you at the usual time.

Sincerely yours,

(s) J. C. ALLEN
Assistant Postmaster General.

Route No. and Termini: 14549, Part A: Danville to Suffolk;
Part B; Danville to Boydton;
Part C: Danville to Emporia;
Part D: Emporia to Suffolk, Virginia.

App. 2

RENEWAL CONTRACT FOR MAIL SERVICE

ROUTE NO. **14549** CONTRACTOR'S ADDRESS { **P. O. Box 752, Suffolk** STATE OF **Virginia**

THIS CONTRACT, Made the **22nd** day of **June**, nineteen hundred and fifty-three, between the UNITED STATES OF AMERICA (acting in this behalf by the Postmaster General) and **Charles T. Crowder**, contractor, and **Peerless Casualty Company**, of **Keene, N. H.**, as his sureties:

WITNESSETH, That whereas **Charles T. Crowder** is the contractor for transporting the mail on Route No. **14549** between **Part A: Danville and Suffolk; Part B: between Danville and Boydton; Part C: between Danville and Emporia and Part D: between Emporia and Suffolk,** State of **Virginia**, pursuant to a contract with the UNITED STATES OF AMERICA, for a term ending June 30, 1953, and whereas said contractor has proposed and the Postmaster General has accepted a renewal of the above-mentioned contract for a term from July 1, 1953, to June 30, 1957, pursuant to Public Law 669, approved June 19, 1948:

NOW, THEREFORE, the UNITED STATES OF AMERICA, on the one hand, and the contractor and the sureties, jointly and severally, on the other hand, do mutually undertake, covenant, and agree as follows:

1. The term of this contract shall be for the period beginning the first day of July, 1953, and ending June 30, 1957.

2. All covenants, conditions and stipulations contained in or forming a part of the above-mentioned contract (as it may have been or may be modified) are incorporated herein and make a part hereof.

3. Payment to the contractor for services performed hereunder shall be at the rate prevailing at the end of the term of the above-mentioned contract, subject to all the conditions contained therein.

4. In addition to any readjustment of compensation provided for in such contract, the Postmaster General may, in his discretion and under such regulations as he may prescribe, with the consent of the contractor, readjust the compensation payable hereunder for increased or decreased costs occasioned by changed conditions occurring during the contract term, which, in the opinion of the Postmaster General, could not reasonably have been anticipated at the time of the execution by the contractor of the renewal proposal and bond for this contract.

5. The contractor warrants that he has not employed any person to solicit or secure this renewal contract upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give the Government the right to annul the contract, or, in its discretion, to deduct from the contract price or consideration the amount of such commission, percentage, brokerage or contingent fees. This warranty shall not apply to commissions payable by contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business.

6. That in the employment of such help as may be necessary, no discrimination shall be made because of race, creed, color, or national origin, in the fulfillment of the contract, and shall include a similar provision in all subcontracts.

IN WITNESS WHEREOF, That said Postmaster General has caused the seal of the Post Office Department to be hereto affixed, and has caused the same to be attested by the signature of the Assistant Postmaster General, and the said contractor and his sureties have hereunto set their hands and seals the day and year set opposite their names, respectively.

Signed, sealed, and delivered this **7th** day of **August** , 19 **53** , by the Assistant Postmaster General in the presence of—

BY ORDER OF THE POSTMASTER GENERAL:

(s) Alice M. Wenger

(s) J. C. Allen
Assistant Postmaster General.

NOTE.—Be careful to write the date you sign opposite signature.

[SEAL]

Signed this **7th** day of **July** , 19 **53** **(s) Charles T. Crowder** , *Contractor*

(s) W. C. Gatling
(s) James L. Ward } Witnesses to signature of contractor.

Signed this ..... day of ....., 19 .... **Peerless Casualty Company** [SEAL]

Signed this **9th** day of **July** , 19 **53** **(s) Dorothy V. Carvin** [SEAL]
Attorney in Fact

} *Sureties.*

(s) James L. Ward
(s) W. C. Gatling } Witnesses to signatures of sureties. **(s) Virginia H. Sandel**
(s) Oscar M. Cassady

NOTE.—There must be two witnesses to the signature of the contractor, and two witnesses to the signatures of the sureties. The two witnesses to the signature of the contractor may also witness the signatures of the sureties. A married woman may be accepted as surety in cases where the laws of the State in which the contract is executed permit her to enter into contracts generally as freely as though she were unmarried. If a female be offered as surety it must be stated whether she is married or unmarried.

NOTE.—The following certificate must be signed by a postmaster or a duly appointed acting postmaster, *and not by any other person*, but is not required when a surety company qualifies as surety.

POST OFFICE: ....., STATE OF .....

....., 19.....

I HEREBY CERTIFY that ....., of .....,

State of ....., and .....,

of ....., State of .....,

are good and sufficient sureties for the amount of the foregoing contract, and I also certify that the sureties are, each and all of them, over 21 years of age, and that neither of them is a postmaster, assistant postmaster, clerk in a post office, rural delivery carrier or other postal employee, or a member of the immediate family of a postmaster or an assistant postmaster.

.....

Postmaster.

CERTIFICATE OF THE OATH OF MAIL CONTRACTORS
REQUIRED BY LAW
(Take this Oath after signing the foregoing Contract)

NOTE.—This oath may be administered by a postmaster or a duly appointed acting postmaster, but NOT by a deputy, assistant postmaster or by a clerk.

When an indemnity company is to become sole surety this oath should be administered before sending the contract to the surety company for completion.

When the oath is taken before a justice of the peace, or any other officer not using a seal, except a judge of a United States court, the certificate of the clerk of a court of record must be added, under his seal of office, that the person who administered the oath is duly qualified as such officer. If the oath is taken before a notary public and his seal is affixed, the certificate of the clerk of a court is not necessary.

I, the undersigned, being employed in the care, custody, and conveyance of the mail as Contractor on the route named in the foregoing contract, do solemnly swear ..... that I will faithfully perform all the duties required of me, and abstain from everything forbidden by the laws in relation to the establishment of Post Offices and Post Roads within the United States; and that I will honestly and truly account for and pay over any money belonging to the said United States which may come into my possession or control. And I also further swear ..... that I will support the Constitution of the United States: SO HELP ME GOD.

STATE OF **Virginia**
COUNTY OF **Nansemond** } *ss:*

(s) Charles T. Crowder
Contractor.

Sworn before the subscriber, postmaster at **Suffolk** , State of **Virginia** , this **7th** day of **July** , A. D. 19 **53** and I also certify that the person above named is not a postmaster, assistant postmaster, a clerk employed in a post office, rural delivery carrier or other postal employee, nor a member of the immediate family of a postmaster, or assistant postmaster, and is, to the best of my knowledge and belief, above the age of 21 years.

(s) S. S. Stallings
Postmaster at **Suffolk, Va.**

CONTRACT FOR MAIL SERVICE

(GENERAL ADVERTISEMENT)

Route No. **14549** *Contractor's Address* { **Suffolk** / *State of* **Virginia**
Annual rate of pay, $ **10,999.99**

THIS ARTICLE OF CONTRACT, Made the **28th** day of **March** , nineteen hundred and forty-five, between the UNITED STATES OF AMERICA (acting in this behalf by the Postmaster General) and **Charles T. Crowder** , contractor and **National Surety Corporation** , of **New York City, New York** as his sureties:

WITNESSETH, That whereas **Charles T. Crowder** has been accepted, according to law, as contractor for transporting the mail on Route No. **14549** from

Part A:

Danville,

by Turbeville, Alton, Harmony, Denniston, Mayo, Christie, Virgilina, Nelson, Buffalo Junction, Clarksville, Jeffress, Finchley, Boydton, Baskerville, Union Level, South Hill, Lacrosse, Lacrosse Railroad station (S.A.L.), Brodnax, Charlie Hope, Lawrenceville, Edgerton, Freeman, Radium, Emporia, Emporia Railroad station (A.C.L.), Adams Grove, Drewryville, Capron, Courtland, Franklin and Holland,

to Suffolk, Virginia, and back, six times a week.

Part B:

From Danville,

by Turbeville, Virgilina, Nelson and Clarksville,

to Boydton, Virginia,

and back **once** a week, **box delivery and collection service not required on either part,**

at the rate of **Ten thousand nine hundred and ninety-nine and 99/100** dollars per annum, for and during the term beginning the first day of July, nineteen hundred and forty-five, and ending June thirty, nineteen hundred and forty-nine. Now, therefore, the said contractor and his sureties do, jointly and severally, undertake, covenant, and agree with the United States of America, and do bind themselves—

1st. To carry said mail with certainty, celerity, and security, using therefor such means as may be necessary to transport the whole of said mail in accordance with specification in the advertisement, whatever may be its size, weight, or increase due to any cause, during the term of this contract, and by the schedule of departures and arrivals stated in the advertisement under which this contract is made, and within the running time fixed therein; and so to carry until said schedule is altered by the authority of the Postmaster General of the United States, as hereinafter provided, and then to carry according to such altered schedule (*Provided,* That when more than ten minutes are taken for opening and closing the mails at any intermediate office, the additional time so taken is to be allowed in addition to the time fixed in said schedule: *And provided further,* That, if available, motor vehicles shall be used when road and weather conditions permit, reasonable additional running time to be allowed for use of other mode of conveyance when road or other conditions preclude use of motor vehicles); and in all cases to carry said mail in preference to passengers and freight, and to their entire exclusion if its weight, bulk, or safety shall so require.

2d. To carry the mail in a safe and secure manner, properly protected under a sufficient rubber, oilcloth, or canvas to prevent it from becoming wet or otherwise injured.

3d. To take the mail and every part thereof from, and deliver it and every part thereof at, each post office on the route, both going and returning, unless otherwise stated, or that may hereafter be established on the route (or on any route that may hereafter be established, and to which this contract may be extended, as hereinafter provided), and into the post office at each end of the route, and into the post office, if one is there kept, at the place at

which the carrier stops for the night; and if no post office is there kept, to lock it up in some secure place, at the risk of the contractor, and to carry the mails over the road on which the former carrier traveled, unless otherwise stated, and in the event that no service has previously been performed on the route, to travel the shortest public road between the points named, unless otherwise stated or ordered by the Department.

4th. To take any mail matter or private mail satchels that may be tendered outside of the usual mail bag from any post office now on the route, or that may hereafter be established on the route, and carry the same to, and deposit into, the proper boxes, or hang the mail satchels on the proper mail cranes, now on or that may hereafter be placed on the line of the route for this purpose (or on any route that may hereafter be established and to which this contract may be extended as hereinafter provided), when requested so to do; also to collect the mail from the boxes (when a signal is displayed to indicate that a box contains mail to be taken) and to deposit the same in the next post office at which the carrier arrives, and to take the mail satchels when they are used, either with or without mail, from the mail cranes and carry them to the post office; also to deliver and collect the mail of each patron who has provided a box or a satchel when such mail cannot be contained in the receptacle, as contemplated by the terms of the advertisement pursuant to which this contract is made.

5th. To be accountable and answerable in damages for the person to whom the said contractor shall commit the care and transportation of the mail, and his careful and faithful performance of the obligations assumed herein, and those imposed by law; not to commit the care or transportation of the mail to any person under eighteen years of age, or any person undergoing a sentence of imprisonment at hard labor imposed by a court having criminal jurisdiction, nor to any person who has not sufficient intelligence properly to handle and deposit the mail for boxes along the route; nor to any person not authorized by law to be concerned in contracts for carrying the mails; to discharge any carrier of said mails whenever required so to do by the Postmaster General; not to carry, otherwise than in the mail, letters, packets, or newspapers which should go by mail, or convey or transport any person engaged in carrying letters, packets, or newspapers which should go by mail; to carry post-office blanks, mail locks and bags, and other postal supplies, and also the post-office inspectors and other special agents of the Post Office Department on the exhibition of their credentials, if a coach or other suitable conveyance is used, without additional charge.

For which services, when performed, and evidence thereof shall have

been filed with the Postmaster General, the said contractor is to be paid by the United States at the rate per annum hereinbefore named; payments to be made monthly, and as soon after the close of each month as accounts can be adjusted and settled; said pay to be subject, however, to be reduced or discontinued by the Postmaster General, as hereinafter stipulated, or to be suspended in case of delinquency.

It is hereby stipulated and agreed by the said contractor and his sureties that the Postmaster General may discontinue or extend this contract, change the schedule and termini of the route, and alter, increase, decrease, or extend the service, in accordance with law, he allowing not to exceed a pro rata increase of compensation for any additional service thereby required; and, in case of decrease, curtailment, or discontinuance of service, as a full indemnity to said contractor, one month's extra pay on the amount of service dispensed with, and not to exceed a pro rata compensation for the service retained; but no increase of compensation shall be allowed for a change of service not amounting to an increase, nor indemnity of month's extra pay for any change of service not involving a decrease of service.

It is hereby also stipulated and agreed by the said contractor and his sureties that whenever, in the opinion of the Postmaster General, it shall become necessary to increase the speed upon which the mail is carried, the service shall be readvertised for the reduced running time required: *Provided*, That the contractor, with the consent of his sureties, shall, subject to all the conditions hereinbefore and hereinafter stipulated, have the option of continuing service upon the expedited running time without additional compensation therefor; and in case the contractor, with the consent of his sureties, shall have signified his desire to continue the service upon the reduced running time, and an order shall have been made in pursuance thereof, he shall, if required by the Postmaster General, perform the expedited service subject to all the conditions hereinbefore and hereinafter stipulated, until the termination of his contract in like manner as if such expedited service had been the original covenant.

It is hereby also stipulated and agreed by the said contractor and his sureties as aforesaid that he shall forfeit—

1st. The price of a trip when it is not run, and in addition, if the failure is occasioned by the fault of the contractor or carrier, an amount not more than three times the price of the trip.

2d. For violating any of the foregoing provisions as to giving preference to passengers or freight over the mail or any portion thereof, or leaving the same for their accommodation; carrying, otherwise than in the mail, matter

which should go by mail; or transporting persons engaged in so doing, with knowledge thereof, a penalty not to exceed one-fourth of the annual pay.

3d. For the loss of, or depredation upon, a mail pouch in the custody of a contractor, a penalty in a sum not to exceed one and one-fourth times the value of the contents lost thereby: *Provided,* That the loss is occasioned by the fault of the contractor or his agent.

4th. For violating any other provision of this contract touching the carriage of the mails, or the time and manner thereof, without a satisfactory explanation of the delinquency, in due time, to the Postmaster General, a penalty in his discretion. That these forfeitures may be increased into penalties of a higher amount in the discretion of the Postmaster General, according to the nature or frequency of the failure and the importance of the mail: *Provided,* That, except as herein otherwise specified, and except as provided by law, no penalty shall exceed three times the pay of a trip in each case.

And it is hereby further stipulated and agreed by the said contractor and his sureties that the Postmaster General may annul the contract or impose forfeitures in his discretion for repeated failures or for failure to perform service according to contract; for violating the postal laws or regulations; for disobeying the instructions of the Post Office Department; for refusing to discharge a carrier, or any other person having charge of the mail by the contractor's direction, when required by the Department; for subletting service without the consent of the Postmaster General, or assigning or transferring this contract; for combining to prevent others from bidding for the performance of postal service; for transmitting matter which should go by mail, contrary to the stipulations herein; for transporting persons so engaged as aforesaid; or for the failure of the contractor to reside upon or contiguous to the route and to give his personal supervision to the performance of the service; that the Postmaster General may annul the contract whenever the contractor shall become a postmaster, assistant postmaster, or Member of Congress, or otherwise legally incompetent to be concerned in such contract; and whenever in the opinion of the Postmaster General, the service cannot be safely continued, the revenues collected, or the laws maintained on the road or roads herein.

And it is hereby further stipulated and agreed by the said contractor and his sureties—

1st. That such annulment shall not impair the right to claim damages from said contractor and his sureties under this contract, but such damages may, for the purpose of set-off or counterclaim, in the settlement of any

claim of said contractor or his sureties against the United States, whether arising under this contract or otherwise, be assessed and liquidated.

2d. That, within the meaning of this contract, foreign mails in transit across the territory of the United States shall be deemed and taken to be mails of the United States.

3d. That this contract may, in the discretion of the Postmaster General, be continued in force beyond its express terms for a period not exceeding six months, until a new contract with the same or other contractors shall be made by the Postmaster General.

4th. That no Member of or Delegate to Congress shall be admitted to any share or part of this contract or agreement, or to any benefit to arise therefrom.

5th. The contractor warrants that he has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give the Government the right to annul the contract, or, in its discretion, to deduct from the contract price or consideration the amount of such commission, percentage, brokerage, or contingent fees. This warranty shall not apply to commissions payable by contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business.

6th. That the contractor shall faithfully discharge all other duties and trusts imposed upon him either by law, by the rules and regulations of the Post Office Department, or by the advertisement pursuant to which this contract is made, and shall faithfully account for, deliver and pay over to the proper official or person, all moneys, mail matter, and other property of every kind which shall come into the possession of said contractor.

7th. To refund any overpayment for service performed or any payment for service not rendered.

8th. That in the employment of such help as may be necessary, no discrimination shall be made because of race, creed, color, or national origin, in the fulfillment of the contract, and shall include a similar provision in all subcontracts.

IN WITNESS WHEREOF, That said Postmaster General has caused the seal of the Post Office Department to be hereto affixed, and has caused the same to be attested by the signature of the Second Assistant Postmaster General, and the said contractor and his sureties have hereunto set their hands and seals the day and year set opposite their names, respectively.

Signed, sealed, and delivered this **17th** *day of* **May** *, 1945, by the Second Assistant Postmaster General in the presence of—*

BY ORDER OF THE POSTMASTER GENERAL:

(s) Ruth H. Langley

(s) Roy M. Martin
Acting *Second Assistant Postmaster General.*
[SEAL]

NOTE.—Be careful to write the date you sign opposite signature.

Signed this **12** day of **April** , 1945. **(s) Charles T. Crowder** , *Contractor.*

(s) J. L. Farless **311 Linden Ave. Suffolk, Va.**
(s) Hugh T. Daughtrey **413 S. Main St. Suffolk, Va.**
} Witnesses to signature of contractor.

Signed this **18** day of **April** , 1945. **National Surety Corporation** [SEAL]
By: (s) .....
Attorney-in-fact } *Sureties.*

Signed this ..... day of ....., 1945. [SEAL]

(s) Lois Printz
(s) Rhoda Goldstein
} Witnesses to signatures of sureties.

NOTE.—There must be two witnesses to the signature of the contractor, and two witnesses to the signatures of the sureties. The two witnesses to the signature of the contractor may also witness the signatures of the sureties. A married woman may be accepted as surety in cases where the laws of the State in which the contract is executed permit her to enter into contracts generally as freely as though she were unmarried. If a female be offered as surety it must be stated whether she is married or unmarried.

NOTE.—The following certificate must be signed by a postmaster or a duly appointed acting postmaster, *and not by any other person*, but is not required when a surety company qualifies as surety.

POST OFFICE: ....., STATE OF .....
....., 1945.

I HEREBY CERTIFY that ....., of .....
State of ....., and .....
of ....., State of .....
are good and sufficient sureties for the amount of the foregoing contract, and I also certify that the sureties are, each and all of them, over twenty-one years of age, and that neither of them is a postmaster, assistant postmaster, clerk in a post office, rural delivery carrier or other postal employee, or a member of the immediate family of a postmaster or an assistant postmaster.

.....
Postmaster.

CERTIFICATE OF THE OATH OF MAIL CONTRACTORS REQUIRED BY LAW

(Take this Oath after signing the foregoing Contract)

NOTE.—This oath may be administered by a postmaster or a duly appointed acting postmaster, but NOT by a deputy, assistant postmaster, or by a clerk.

When an indemnity company is to become sole surety this oath should be administered before sending the contract to the surety company for completion.

When the oath is taken before a justice of the peace, or any other officer not using a seal, except a judge of a United States court, the certificate of the clerk of a court of record must be added, under his seal of office, that the person who administered the oath is duly qualified as such officer. If the oath is taken before a notary public and his seal is affixed, the certificate of the clerk of a court is not necessary.

I, the undersigned, being employed in the care, custody, and conveyance of the mail as Contractor on the route named in the foregoing contract, do solemnly swear ..... that I will faithfully perform all the duties required of me, and abstain from everything forbidden by the laws in relation to the establishment of Post Offices and Post Roads within the United States; and that I will honestly and truly account for and pay over any money belonging to the said United States which may come into my possession or control. And I also further swear ..... that I will support the Constitution of the United States: SO HELP ME GOD.

STATE OF **Virginia**
COUNTY OF **Nansemond** } *ss:*

(s) Charles T. Crowder
Contractor.

Sworn before the subscriber, postmaster at **Suffolk** , State of **Virginia** , this **12th** day of **April** , A. D. 1945, and I also certify that the person above named is not a postmaster, assistant postmaster, a clerk employed in a post office, rural delivery carrier or other postal employee, nor a member of the immediate family of a postmaster or assistant postmaster, and is, to the best of my knowledge and belief, above the age of twenty-one years.

(s) S. S. Stallings
Postmaster at **Suffolk, Va.**

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In The
SUPREME COURT of the UNITED STATES
OCTOBER TERM, 1955

NO. 494

CHARLES T. CROWDER,
Appellant

v.

COMMONWEALTH OF VIRGINIA,
at the relation of the
STATE CORPORATION COMMISSION,
Appellee

GEORGE H. ELLIS,
Appellant

v.

COMMONWEALTH OF VIRGINIA,
at the relation of the
STATE CORPORATION COMMISSION,
Appellee

BRIEF OF APPELLANTS
OPPOSING APPELLEE'S MOTION TO DISMISS

Having been presented within the Appellee's Motion and more satisfactorily within the Appellants' State-

ment as to Jurisdiction, in accordance with Supreme Court of the United States Rule 40(5), items (a), (b), (c), (d) and a concise statement of the case are not repeated herein for sake of brevity.

I. THE ARGUMENT

A. Postal Service a Federal Function

Among the powers yielded by the several States solely to the Federal Government were those pertaining to interstate commerce and the Postal System, Article 1, Section 8, Clauses 3 and 7, of the United States Constitution.

Pursuant to that authority Congress assumed exclusive jurisdiction over post roads and post routes and provided for the carriage of mail. Title 39, Chapter 14, Sections 481-504, inclusive, U. S. C. A.

In *Aetna Ins. Co.* v. *Ill. Central R. Co.*, 6 N. E. (2d) 189, 365 Ill. 303, reversing 283 Ill. App. 527, Certiorari granted, 57 S. Ct. 939, 301 U. S. 679, 91 L. Ed. 1338. Certiorari dismissed, 58 Sup. Ct. 269, 302, U. S. 652, 82 L. Ed. 505, the Court said:

> "We are of opinion that, when a letter is mailed, it is from then on in the exclusive control of the government; that its transportation, guarding, and delivery are governmental functions; and that whoever performs those functions, whether carefully or otherwise, is in the service of the government. With some distinctions between land grant roads and others, the railroads are required to receive all mailable matter in such containers as the gov-

ernment may provide or prescribe and to handle and transport it in accord with contracts the terms of which are prescribed by law and as directed by federal statute and general orders of the Postmaster General."

The United States, in the handling and carriage of mail, is thus engaged in an exclusive governmental function and of necessity must employ means and services to carry out such functions. Hence in the carriage of mails through the means of motor vehicles owned and operated by the appellants it is engaged in no private function or proprietary capacity but in carrying out a duty with which it alone is charged. In all of such functions it must, of necessity, operate through the services of individuals and other entities.

It may be argued that the tax is assessed against appellants, but that is not true because the tax is levied upon gross receipts from the USE of the means and instrumentalities in carrying the mail, thus is a tax upon the contract itself. If the State may tax the receipts from the exclusive carriage of mail then it may tax to the point of great burden or destruction and thereby increase the cost of carrying the mail and directly force the fixation of postal rates determined by State taxation. The cost of transportation of the mails may then differ in as many states as impose a tax.

If it may assess a gross receipts road tax of two percent it may assess a tax of twenty percent, or may raise the tax to the point of prohibition. If it may tax the instant operations it may tax also rural mail carriers, or parcel post, or special delivery, or the vehicles of any department of the government. If it may tax the United States mail regardless of origin and termini it may like-

wise burden the interstate transit and transport thereof. For no one can say that a mail sack originating in Suffolk and terminating in Bristol, or Danville, does not carry mail for rural routes running into Tennessee, or North Carolina, or that the contents are not redistributed or redispatched to Utah or New Zealand along with other mail collected.

B. Immunity from State taxation of means and instrumentalities employed by the Federal Government to carry on its functions

In *McCulloch* v. *Maryland,* 17 U. S. 316, 4 L. Ed. 579, Chief Justice Marshall stated succinctly that the Constitution implied immunity from State taxation of means and instrumentalities employed by the Federal Government to carry on its functions. Said the Court:

> "The taxing powers of a state are limited to persons and property located and acts performed within its jurisdiction. *The sovereignty of a state extends to everything which exists by its own authority or is introduced by its permission, but it does not extend to those means which are employed by Congress to carry into execution the powers conferred upon that body by the constitution of the United States.* It is consequently well settled that a state has no power to tax the means and instrumentalities which the federal government employs to carry on its proper functions. If the states may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent

rights; they may tax the papers of the custom house; they may tax judicial process; they may tax all the means employed by the government to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the states." (Italics supplied).

* * * * * * * * *

"The sovereignty of a state extends to every thing which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution—powers conferred on that body by the people of the United States? We think it demonstrable that it does not. Those powers are not given by the people of a single state. They are given by the people of the United States, to a government whose laws, made in pursuance of the constitution, are declared to be supreme. Consequently, the people of a single state cannot confer a sovereignty which will extend over them."

C. The obligation to pay for use of the highways

The Commonwealth has taken the position that it is entitled to charge transporters of mail for the use of the highways. The same argument could be advanced for the transportation of any Government property, cannons, ammunition, mail, supplies, money, currency,

or the operation of any vehicle, until each State became a port of entry.

This argument is fallacious and without merit in that all Federal aid to highways stems from the Federal Aid Act of July 11, 1916, c. 241, 39 Stat. 355, and from the Act of November 9, 1921, c. 119, which is entitled "An Act To amend the Act entitled 'An Act to provide that the United States shall aid the States in the construction of rural post roads, and for other purposes,' approved July 11, 1916, as amended and supplemented, and for other purposes," and from this Act to the present Acts, constituting Federal aid to highways, (Title 23, U. S. C. A.) all such aid has been provided by the Federal Government as could reasonably be required of it to pay its way for the use of State highways for postal service and transport.

It cannot be said then that the State is equitably or legally entitled to any contribution by levy upon the gross receipts from the carriage of United States mail over the highways.

Conceivably, and probably, if the Commonwealth of Virginia can lay a tax upon the gross receipts from the carriage of the United States mail,—and such carriage does not depend on whether it is interstate or intrastate, —then the way is open to every State in the Union to lay a similar tax and thereby drive the highway transportation of mail from the roads.

D. The tax is a privilege tax regardless of its designation

It will be observed that under Section 58-638 of the Code of Virginia, *supra*, the tax is two percentum of the

gross receipts upon the *operations* of a motor vehicle for transportation of property "*in addition* to any other fees and taxes imposed by law upon motor vehicles, trailers and semi-trailers, *and upon the operation thereof*, and *in addition* to any motor fuel tax paid or payable by such person, a road tax calculated on the gross receipts derived from such operaitons * * * ". (Italics supplied).

It is strictly then a tax on the privilege of the use of the highways notwithstanding allocation of the taxes so collected. It is moreover a tax on gross income from the transportation of mail and falls in the same category as gross income derived from transportation in interstate commerce, because the carriage of mail is strictly a governmental function exclusively that of the United States. The freedom of the mails is a vital and indispensable part of the economic life and political existence of the United States. The powers to keep the channels of interstate commerce open and to provide for the uninterrupted and continuous carriage of United States mail were cardinal parts of the adoption of our Constitution.

The tax here is not upon the property used in carrying out a Government function, but upon the operations necessary therefor, and hence, upon the operation itself.

This Court has consistently distinguished between a tax upon property and the agency used to carry out a Government operation, so long as the tax did not affect the operation itself, but in no case has this Court ever held a tax upon the gross income derived from performing a Governmental function to be valid.

This Court has ever been careful to protect interstate commerce, *a fortiori*, should it protect the carriage of the United States mail from a tax which may, by the ukase or

ill-advised Legislation of some State, subject it to a tax burdensome in carrying out of the Governmental function itself.

Nor will this Court be misled by any name or construction put upon the Act in question by administrative agencies, legislatures or lower Courts, and the statute in question is the type the constitutional significance of which this Court has consistently reserved unto itself. *Galveston H. & S. A. R. Co.* v. *Texas*, 210 U. S. 217 (1908); *Wagner* v. *City of Covington*, 251 U. S. 95 (1919); *Storaasli* v. *Minnesota*, 283 U. S. 57 (1931); *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435 (1940).

The Virginia Supreme Court has used *Alward* v. *Johnson*, 282 U. S. 539, 51 S. Ct. 273, 75 L. Ed. 496, as practically its sole authority for its decision upholding the validity of Section 58-638 of the Code, and consequently the tax upon the operations of appellants in carrying the mail. This is, however, a very slender reed upon which to rest because the decision rests upon a tax upon *property exclusively* and consequently has no relevency to the issue here.

There are many distinctions to be drawn between the Alward case and the case at bar.

(1) Alward was a common carrier of persons and property and as such compelled to operate on fixed routes, between fixed termini, on non-discriminatory rates, whether he carried mail or not, consequently the carriages of mail was a mere incident to his operations.

(2) The mail contract was not the cause for the operations.

(3) The tax was held to be *"essentially one on property"*.

(4) The tax was "in lieu of all other taxes and licenses, state, county and municipal, *upon the property* above enumerated of such companies * * * ".

(5) *"There was no tax upon the contract for such carriage; the burden laid upon the property* employed affected operations of the federal government only remotely."

(6) The gross receipts road tax in Virginia is not in lieu of all other taxes, nor a tax on property, but is a gross receipts tax *upon operations* by its very terms.

(7) Appellants are neither common nor contract carriers.

(8) Appellants are engaged in no transportation except for the Post Office Department.

(9) Appellants' entire gross receipts are from the Post Office Department.

(10) The tax presently in issue would substantially interfere wtih the postal system and interstate commerce.

(11) Appellants' operations do not fall within the sphere of a utilities or public service commission; they are not subject to the orders or decrees of such with respect to equipment, rates, schedules or load; consequently, in no category may it be said that the Alward case is any authority whatever for the decision of the Commission in the case at bar, or that of the Virginia Supreme Court.

It is therefore respectfully submitted that the instant question concerning the carriage of United States mail has never been presented to any court before and that this Honorable Court is not bound by the decision of the Virginia court in defining the nature of the tax under review and should determine for itself its effect and whether it constitutes a burden on interstate commerce or a governmental function when applied to appellants.

E. Pertinency of cases involving a tax on gross receipts from Interstate Commerce

As stated, there are no cases concerning a tax upon the gross income from the carriage of United States mail, but those cases dealing with a tax upon the privilege of engaging in interstate commerce and hence upon the carriage itself are apropos. If this Court has held that interstate commerce is exempt from direct tax on gross receipts derived from interstate commerce, with even greater force it should hold invalid a direct tax on gross receipts from the carriage of United States mail.

There are numerous cases in which a tax, on *gross* receipts and a similar tax on the carriage of persons and property have been held to be *privilege*,—and consequently an invalid,—tax rather than property tax.

In *New Jersey Bell Telephone Co.* v. *New Jersey*, 280 U. S. 338 (1930), a telephone company, part of the business of which was in interstate and foreign commerce, was taxed *ad valorem* on its real and personal property and was subjected to a franchise tax of 5% of the gross receipts apportioned to New Jersey. The statute called the tax a *franchise* or privilege tax and the state sought to support it as a tax on *property* represented by the value of the company's franchise. The Court held that it was not a property tax:

> "We think it very plain that the exaction is not a tax on property nor in substitution for or in lieu of a property tax. Within the rule heretofore applied in this Court the exaction is a direct tax on gross receipts derived from appellant's interstate commerce and, as

to that part at least, is void. *Philadelphia Steamship Co.* v. *Pennsylvania,* 122 U. S. 326, 345. *Galveston, H. & S. A. R. Co.* v. *Texas, supra,* 227. *Meyer* v. *Wells, Fargo & Co.,* 223 U. S. 298. *U. S. Express Co.* v. *Minnesota,* 233 U. S. 335. *Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292, 295, 297. *Cudahy Packing Co.* v. *Minnesota,* 246 U. S. 450. *U. S. Glue Co.* v. *Oak Creek,* 247 U. S. 321, 329. *Pullman Co.* v. *Richardson, supra.*" (p. 349).

Of especial significance is *American Barge Line Co.* v. *Koontz,* 68 S. W. (2d) 56 (W. Va. 1951), in which the Supreme Court of that State held that an annual *privilege* tax based on *gross* income from the business of transporting passengers and freight by steamboat was clearly a privilege tax on interstate commerce in contravention of the Commerce Clause of the Federal Constitution. This case represents the reverse of the conclusions of the Supreme Court of Appeals of Virginia in the case at bar and so presents a conflict between the respective Supreme Courts of the two states which should be resolved by this Court so that uniformity of taxation will be achieved.

In *Ohio Tax Cases,* 232 U. S. 576 (1914), the Supreme Court held that a tax on gross intrastate earnings of railway companies, in addition to the taxes on their property, was a *privilege* or *occupation* tax and not a *property* tax, and in *Meyer* v. *Wells, Fargo & Co.,* 223 U. S. 298 (1912) a gross receipts tax on public service corporations, including express companies, was held not to be a tax upon the property of express companies.

In *Spector Motor Service* v. *O'Connor,* 340 U. S. 602, 95 L. Ed. 573, 71 S. Ct. 508, where a foreign corporation

qualified to do business in Connecticut by filing the necessary papers with the Secretary of State, leased and utilized terminals in Connecticut, employed twenty-seven full time workers at New Britain, with a salary of $1,200.00 per week, owned and operated pickup trucks registered in its name, which it used to pick up and concentrate freight by the use of Connecticut highways as an incident to its interstate transportation business and the State of Connecticut sought to collect an annual tax, or excise, upon its franchise, for the privilege of carrying on or doing business within the state, "such tax to be measured by the entire net income as herein defined received by such corporation, or association, *from business transacted within the State* during the income year and to be assessed at the rate of *2%*; * * * " it was *Held*, that the tax was violative of interstate commerce clause as a tax upon the right to engage in interstate commerce and therefore was invalid. (Italics supplied).

In *Pullman Co.* v. *Richardson, Treasurer*, 261 U. S. 330, 67 L. Ed. 683, 43 S. Ct. 366, a case which is very much in point, Mr. Justice Van Devanter, said:

> "A state can neither tax the act of engaging in interstate commerce nor lay a tax on gross receipts therefrom. In either case the tax would be a restraint or burden on such commerce, and its imposition an invasion of the power of regulation confided to Congress by the commerce clause of the Constitution."

In *Joseph* v. *Carter & Weekes Stevedoring Co.*, (1947) 330 U. S. 422, 91 L. Ed. 993, 67 S. Ct. 815, where the City of New York attempted to levy a percentage tax on gross receipts from stevedoring it was *Held*, that the tax was invalid as restrictive of interstate commerce.

In *Ozark Pipe Line Corp.* v. *Monier*, 266 U. S. 555, 69 L. Ed. 439, 45 S. St. 184, appellant, a Maryland Corporation, owned and operated a pipe line extending from within Oklahoma through Missouri to a point in Illinois, through which oil was conducted to Illinois and there delivered. It maintained an office in Missouri where it kept its books, paid its employees within and without the State, purchased supplies, employed labor, entered into contracts for transportation of crude oil, maintained three pumping stations in Missouri to speed passage of the oil and carried on various other activities in furtherance of its interstate business. Appellant paid general property taxes on that portion of its line in Missouri. The State of Missouri attempted to collect an annual franchise tax on one-tenth of one percent of the par value of its capital stock and surplus employed in business in the State, deemed "that portion of its entire capital stock and surplus that its property and assets in this State bear to all its property and assets wherever located". It was *Held* that the tax was invalid as a tax on interstate commerce.

F. The Basic Error of the Supreme Court of Appeals of Virginia

The lower Court erred in its failure to draw the proper distinction between those instrumentalities through which the Government immediately and directly exercises its sovereign powers and those which are incidental and have slight relation to Governmental operations.

Metcalf and Eddy v. *Mitchell*, 269 U. S. 514, 70 L. Ed. 384, 46 S. Ct. 172, serves to bring under scrutiny the distinction which appellants assert free them from the payment of State tax on gross income received from the *per-*

formance of a governmental function under the direction and control of the Postmaster General.

Factually, the case involves the assertion of consulting engineers on water and sewerage projects, to states and subdivisions, of their right to recover income taxes on their earnings, paid under protest, which they claimed to be exempt. The Court very properly *Held* that they were *not officers or agents, or under the control of the various states and municipalities and therefore were not exempt.*

Said Mr. Justice Stone, in delivering the opinion of the Court:

> "So far as appears, they were in the position of independent contractors. *The record does not reveal to what extent, if at all, their services were subject to the direction or control of the public boards or officers engaging them.* In each instance *the performance of their contract involved the use of judgment and discretion on their part* and they were required to use their best professional skill to bring about the desired result. *This permitted to them liberty of action which excludes the idea that control or right of control by the employer which characterizes the relation of employer and employee and differentiates the employee or servant from the independent contractor.* (Citing cases).
>
> "We pass to the more difficult question whether Congress had the constitutional power to impose the tax in question, and this must be answered by ascertaining whether its effect is such as to bring it within the purview of those decisions holding that the very nature of our constitutional system of dual sovereign governments is such as impliedly to prohibit the federal government from taxing the instrumentalities of

a state government and in a similar manner to limit the power of the states to tax the instrumentalities of the federal government. (Citing cases).

"*Just what instrumentalities of either a state or the federal government are exempt from taxation by the other cannot be stated in terms of universal application. But this court has repeatedly held that those agencies through which either government immediately and directly exercises its sovereign powers, are immune from the taxing power of the other.* Thus the employment of officers who are agents to administer its laws (*Collector* v. *Day; Dobbins* v. *Commissioners of Erie County, supra*), its obligations sold to raise public funds (*Weston* v. *City Council of Charleston, supra; Pollock* v. *Farmers' Loan & Trust Co., supra*), its investments of public funds in the securities of private corporations, for public purposes (*United States* v. *Railroad Co., supra*), surety bonds, exacted by it in the exercise of its police power (*Ambrosini* v. *United States, supra*), are all so intimately connected with the necessary functions of government, as to fall within the established exemption; and *when the instrumentality is of that character, the immunity extends not only to the instrumentality itself but to income derived from it* (*Pollock* v. *Farmers' Loan & Trust Co., Gillespi* v. *Oklahoma, supra*), and forbids an occupation tax imposed on its use (*Choctaw, O. & Gulf R. R. Co.* v. *Harrison, supra*). And see *Dobbins* v. *Commissioners of Erie County, supra.*

"When, however, the question is approached from the other end of the scale, it is apparent that not every person who uses his property or derives a profit, in his

dealings with the government, may clothe himself with immunity from taxation on the theory that either he or his property is an instrumentality of government within the meaning of the rule. (Citing cases).

"*As cases arise, lying between the two extremes, it becomes necessary to draw the line which separates those activities having some relation to government, which are nevertheless subject to taxation, from those which are immune. Experience has shown that there is no formula by which that line may be plotted with precision in advance.* But recourse may be had to the reason upon which the rule rests, and which must be the guiding principle to control its operation. Its origin was due to the essential requirements of our Constitutional system that the federal government must exercise its authority within the territorial limits of the states; and it rests on the conviction that each government in order that it may administer its affairs within its own sphere, must be left free from undue interference by the other. (Citing cases).

"*While it is evident that in one aspect the extent of the exemption must finally depend upon the effect of the tax upon the functions of the government alleged to be affected by it, still the nature of the governmental agencies or the mode of their constitution may not be disregarded in passing on the question of tax exemption; for it is obvious that an agency may be of such a character or so intimately connected with the exercise of a power or the performance of a duty by the one government, that any taxation of it by the other would be such a direct interference with the functions of government itself as to be plainly beyond the taxing power.*

"*It is on this principle that*, as we have seen, *any taxation by one government* of the salary of an officer of the other, or the public securities of the other, or *an agency created and controlled by the other, exclusively to enable it to perform a governmental function* (*Gillespi* v. *Oklahoma, supra*), *is prohibited.* But *here the tax is imposed on the income of one who is neither an officer nor an employee of government* and whose only relation to it is that of contract, under which there is an obligation to furnish service, for practical purposes not unlike a contract to sell and deliver a commodity. The tax is imposed without discrimination upon income whether derived from services rendered to the state or services rendered to private individuals. In such a situation it cannot be said that the tax is imposed upon an agency or government in any technical sense, and the tax itself cannot be deemed to be an interference with government, or an impairment of the efficiency of its agencies in any substantial way. (Citing cases).

* * * * * * *

"*These statements we deem to be equally applicable to private citizens engaged in the general practice of a profession or the conduct of a business in the course of which they enter into contracts with government from which they derive a profit. We do not suggest that there may not be interferences with such a contract relationship by means other than taaxtion which are prohibited. Railroad Co.* v. *Peniston, supra*, at page 36, recognizes that there may. *Nor are we to be understood as laying down any rule that taxation might not affect agencies of this character in such a manner as directly*

to interfere with the functions of government and this be held to be void." (Italics supplied).

It need hardly be said that the carriage of United States mail is intimate, direct and a necessary function of the United States Government. If this be the fact, and it is, then the tax asserted by the Commonwealth of Virginia cannot be sustained.

The Virginia Supreme Court held that the appellants were independent contractors. This, however, could not be true, because their contracts must be performed under the supervision and control of the Postmaster General, they must give the operations their personal supervision, they must live contiguous to the routes, the contracts may not be assigned and are therefore personal, and the services performed must be in accordance with the Postal Laws and Regulations.

One is an independent contractor when he may perform the services and do the work contracted for as befits him, or suits his purpose, or convenience, and to whom the employer only looks for results. He is a free agent which is the very antithesis of the postal contract in issue since the appellants are always within the jurisdiction and under the direction, control and supervision of the Post Office Department as to routes, methods, schedules, time, equipment, supervision, and every phase of the operation, and in so engaging appellants are operating functionaries of the United States Government.

If appellants are in fact engaged in carrying out a governmental function under the direction and control of the Postmaster General and subject to Postal Laws and Regulations the gross receipts from the carriage

may not be taxed upon any guise whatever. No State has yet had the temerity to assess a gross receipts road tax resulting from the use of vehicles engaged exclusively in carrying the mail. Whatever the category in which the appellants may be placed if their operations are directly tied up with an essential function of the United States Government they are the alter ego of the Government and immune from the tax sought to be imposed.

It is certainly remarkable that in the twenty-five years of operation by Mr. Crowder the State has just reached consciousness with respect to carriers of mail on the highways and byways of Virginia. It has either considered such carriage as exempt or convicts itself of an oversight resulting in substantial loss.

CONCLUSION

It is, therefore, submitted that Section 58-638 of the Code of Virginia provides for a tax which is essentially one on the privilege of operating motor vehicles over the highways of Virginia in performance of a Federal Governmental function; that it is in its essence a tax upon gross receipts from the carriage of United States mail, both intrastate and interstate, and a tax upon the agreement itself between appellants and the Postmaster General.

For the foregoing reasons, appellants respectfully submit that the judgments appealed from should be reversed and the statute as construed by the Virginia

Court and applied to appellants declared unconstitutional.

Respectfully submitted,

ALEXANDER H. SANDS, SR.,
American Building,
Richmond, Virginia.

THOMAS L. WOODWARD,
American Bank Building,
Suffolk, Virginia.

FRANK A. S. WRIGHT,
Mutual Building,
Richmond, Virginia.

Counsel for Appellants.

CERTIFICATE OF SERVICE

I hereby certify that I have forwarded a copy of the foregoing Brief of the Appellants Opposing Appellee's Motion to Dismiss to J. Lindsay Almond, Jr., and C. F. Hicks, Counsel of record for the Appellee, on this 8th day of January, 1956.

FRANK A. S. WRIGHT,
Of Counsel for Appellants.